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ABSTRACT

This paper reviews some of the speaker ban cases that were tested in U.S. district courts. The cases discussed are: (1) the attempt by University of North Carolina administrators to ban Herbert Aptheker (an avowed Communist) from speaking on campus; (2) the class action of the Chicago Circle campus of the University of Illinois brought before a special three-judge federal court to have the Clabaugh Act declared unconstitutional; (3) the barring from Auburn University of William Sloan Coffin, a man convicted of a felony; (4) the rejection by the administration of the University of Tennessee of proposed invitations by a student organization to Dick Gregory and Timothy Leary; and (5) and the rules governing guest speakers promulgated by the Mississippi Board of Trustees of State institutuions of Higher Learning which were applicable to all campuses. None of the speaker bans were upheld in the courts. (AF)

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THE "SPEAKER BAN" FUROR

Charles Alan Wright, professor of law at the University of Texas who delivered the Oliver Wendell Holmes lectures at the Vanderbilt University School of Law in April 1969, said:

"I cannot find a single case decided on its merits in this decade in which a speaker ban has been upheld by a court... I am strongly tempted to believe that the only good speaker ban is one that has not yet been tested in court."[1/] The record has continued unspoiled.

North Carolina and Illinois

In 1963 North Carolina enacted a measure prohibiting any person known to be a member of the Communist party or any person who had pleaded the Fifth Amendment in a loyalty investigation, from being invited to speak on the campus of any state-supported university or college. Controversy ensued, and Governor Dan Moore appointed a special "speaker policy study commission" which recommended that speakers as described in the statute should be allowed to appear only "infrequently" and only "when it would serve educational purposes". All the institutional governing boards then adopted these recommendations, and in 1965 the legislature amended the act of 1963 to delegate authority in the matter to the boards.

1/ At pages 1050, 1051 of Charles Alan Wright, "The Constitution on the Campus". Vanderbilt Law Review XXII, No. 5 (October 1969), 1027-1088.

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In 1968 the duly elected president of the student body at the Chapel Hill campus of the University of North Carolina, and other officers and members of recognized student organizations, wishing to invite Herbert Aptheker (avowed Communist) and Frank Wilkinson (outspoken advocate of abolishing the U.S. House Un-American Activities Committee who once pleaded the Fifth Amendment) to speak on the campus, found their invitations repudiated and the speakers rejected by Acting Chancellor J. Carlyle Sitterson, backed by President William Friday.

The students, joined as plaintiffs by the prospective speakers, then sued in federal district court to have declared unconstitutional the statute of 1965 and the rules of the trustees adopted under it in 1966. The court granted the injunction sought, and pronounced the statute and the rules null and void, because of vagueness. They ran afoul of the First Amendment protection of free speech and assembly because a prohibitory statute must be worded with sharp precision so that a reasonable interpretation will not leave doubt as to what is forbidden and what is not, thus actually limiting the freedom of prudent or timid persons who will stay far away from the area of doubt.

"In order to withstand constitutional attack", such statutes, said the court, "must impose a purely ministerial duty upon the person charged with approving or disapproving an invitation to a speaker falling within the statutory classifications, or contain standards sufficiently detailed to define the bounds of discretion. Neither criterion has been met with respect to the procedures

and regulations in question."

Said U. S. District Judge Edwin M. Stanley: "It is beyond question that boards of trustees of state-supported colleges and universities have every right to promulgate and enforce rules and regulations consistent with constitutional principles, governing the appearance of all guest speakers... No one has an absolute right to speak on a college or university campus, but once such institution opens its doors to visiting speakers it must do so under principles that are constitutionally valid." 2/

In 1947 the Illinois legislature enacted a measure known as the Clabaugh Act, providing that "No trustee, official, instructor or other employee of the University of Illinois shall extend to any subversive, seditious, and un-American organization, or to its representatives, the use of any facilities of the University for the purpose of carrying on, advertising, or publicizing the activities of such organization."

Students at the Chicago Circle campus of the University of Illinois brought a class action before a special three-judge federal court, to have this statute declared unconstitutional and void. Among the plaintiffs was a group known as Illinois Humanists, whose proposed invitation to a guest speaker (Louis Diskin, a Communist) had been rejected by the administration, the court found, "Solely on the basis of the speaker's associations and the views to be es-

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2/ Dickson v. Sitterson, (U.S.D.C.,N.C.), 280 F. Supp. 486 (1968).

poused." It was clear that the standing policy of the University was to allow any guest speaker who had been invited by a recognized student group, to speak at a reasonable time, space permitting.

"We hold", said District Judge Alexander J. Napoli, "that the Act, both on its face and as applied to these plaintiffs, has denied them due process of law, because it lacks the precision of language required for a statute regulating an area so closely intertwined with First Amendment liberties; because it is an unjustifiable prior restraint to speech; and because it lacks the procedural safeguards required for a form of regulation amounting to censorship."

He went on to explain that speech may be suppressed only when it presents a clear and present danger that substantive evil may result. "A statute which fails to provide an ascertainable standard of conduct and which because of its vagueness inhibits the exercise of constitutionally protected freedoms of speech and assembly is void...

"A statute purporting to regulate expression may not be so broad in its sweep as to hazard the loss or impairment of First Amendment freedoms by appearing to cover speech which may not constitutionally be regulated...

"Any system of prior restraint comes to this Court bearing a heavy burden against its constitutional validity...

"Viewed against the backdrop of these constitutional principles, the Act, and the regulations made pursuant to it, are abhorrent to the Constitution of the United States." 3/

3/ Snyder v. Board of Trustees of University of Illinois, (U.S.D.C., Ill.), 286 F. Supp. 927 (1968)

In Alabama and Tennessee

Auburn University in Alabama had rules barring as a guest speaker "any person convicted of a felony", and also apparently anyone having "ideas Auburn could not sanction." These rules were presumably written by the former President Harry M. Philpott and administered by him.

The Human Rights Forum, a student organization duly recognized as such, invited William Sloan Coffin, the controversial Chaplain of Yale, to address it; whereupon the administration forbade his appearance. Representatives of the Forum asked the United States district court to enjoin the University from interfering, and to declare the rules unconstitutional.

District Judge Frank M. Johnson granted the injunction, and pronounced the rules invalid. Quoting the First Amendment, "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble", he pointed out that the United States Supreme Court has recognized that hearers and readers have rights under that provision. "There can no longer be much doubt that constitutional freedoms must be respected in the relationships between students and faculty and their university... Indeed, it could be argued that an open forum is even more important on a campus than among the public generally."

Quickly noting that "an institution might provide for procedures permitting an orderly scheduling of facilities, and it might preclude conflicts with academic events", the court then declared "the regulations may not be used to deny either the speakers or the listeners equal protection of the laws by discriminating among

speakers according to the orthodoxy or popularity of their political or social views."

After observing that at the time of this suit Chaplain Coffin had been convicted of a felony in a federal district court in Massachusetts, but that conviction was then on appeal, Judge Johnson remarked that lawyers would not apply the word "convicted" until after all appeals had been exhausted. (The conviction was in fact later reversed).

Further, said Judge Johnson, "That part of the regulation which would bar speakers whose views Auburn could not sanction also sweeps overbroadly, although it is difficult for this Court to see why a university administration should be thought to have the authority to approve the ideas of a campus speaker as a condition to the speaker's appearance at the invitation of students and faculty. If this is a legitimate concern, it can be dealt with in ways other than totally barring the speaker.

"The vice in these regulations, however, is really far more basic than their just being vague and overbroad. These regulations... are not regulations of conduct at all... The State of Alabama can not, through its President of Auburn University, regulate the content of ideas students may hear... Such action... is unconstitutional censorship... While it can be said that President Philpott has the ultimate power to determine whether a speaker is invited to the campus, the First Amendment right to hear of the students and faculty of Auburn University means that this determination may not be made for the wrong reasons or for no reason at all.

"The evidence in this case does not reflect any likelihood of disruption of the academic functions and mission of Auburn University by reason of the appearance and lecture of the Rev. Coffin."[4/] Five months later this decision was affirmed by the United States Court of Appeals, Fifth Circuit, in an opinion by Circuit Judge Griffin B. Bell.

The University of Tennessee had an officially sanctioned organization exclusively of students, known simply as "Issues", which operated a lecture series on an annual budget of $12,000, allotted from student activities fees. During the academic year 1968-69 this organization's proposed invitations to Dick Gregory, Negro civil rights activist, and Timothy Leary, of hallucinogenic drug fame, were rejected by the university administration.

Rules in the student handbook included: "An invitation to a speaker who is to be sponsored by a student organization must be approved by the appropriate officers and faculty-alumni advisers to that organization and registered with and approved by the Dean of Students as meeting the following criteria:

"(1) The speaker's competence and topic shall be relevant to the approved constitutional purpose of the organization;

"(2) There is no reason to believe that the speaker intends to present a personal defense against alleged misconduct or crime which is being adjudicated in the courts;

"(3) There is no reason to believe that he might speak in a libelous, scurrilous or defamatory manner or in violation of public

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4/ Brooks v. Auburn University, (U.S.D.C, Ala.) 296 F. Supp. 188 (1969). Affirmed, (U.S.C.A., 5 Cir.), 412 F. 2d 1171 (1969).

laws which prohibit incitement to riot and conspiracy to overthrow the government by force."

The aggrieved students attacked these rules as unconstitutionally broad and vague, and asked for an injunction and a declaratory judgement to that effect. Chief Judge Robert L. Taylor wrote the decision of the United States district court. He granted no injunction, because "The defendants are responsible citizens who occupy high positions in state government. We believe that they will abide by the declaration of this Court that the current policy of the University of Tennessee is not in accord with the plaintiffs' First Amendment rights because the standards fixed for the selection of outside speakers are too broad and vague... but plaintiffs may renew their application at an appropriate time if it becomes necessary."

"The University has made it its policy to allow recognized student groups to invite speakers and to make university facilities available to both speaker and audience. The regulations by which the University denies permission for the appearance of speakers are required by the Constitution to be clearly and narrowly worded. The existing regulations in the Student Handbook do not satisfy those requirements." (Because they are susceptible of arbitrary determination).

Citing the North Carolina, Illinois, and Auburn University decisions of recent months, and observing that they are in general harmony with established definitions of First Amendment rights by the United State Supreme Court, District Judge Taylor added: "The interchange of ideas and beliefs is a constitutionally protected necessity for the advancement of society."[5/]

5/ Smith v. University of Tennessee, (U.S.D.C., Tenn.), 300 F. Supp. 777 (1969)

Mississippi

In Mississippi, the Board of Trustees of State Institutions of Higher Learning governs all the state universities and colleges. Its rules regarding guest speakers, applicable to all campuses, were challenged as to constitutionality by student organizations at the two principal universities. A faculty association and other interested persons joined as plaintiffs.

The rules adopted at various times during recent years were first examined by a special three-judge federal court in January 1969, and found unconstitutionally vague on their face "for lack of objective measurement, thus falling within the compass of those decisions of the Supreme Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law." 6/

Among the causes for rejection found in these rules were clauses apparently barring "speakers who will do violence to the academic atmosphere", "persons in disrepute in the area from whence they come", "those charged with crime or other moral wrongs", "any person who advocates a philosophy of the overthrow of the government of the United States", "any announced political candidate or any person who wishes to speak on behalf of a political candidate", or "sectarian or political meetings on the campuses, conducted by organizations outside the college complex." These, said the court, "obviously must be, and are, condemned under the void-for-vagueness doctrine."

6/ Citing Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L. Ed. 2d 377 (1964), in which the opinion by Mr. Justice Byron R. White invalidated "loyalty oath" statutes of Washington State.

The Board of Trustees, wishing to submit new regulations for the approval of the court, was allowed sixty days in which to do so, and did so on March 10, 1969, only to see them held to be "either invalid for vagueness under the Due Process Clause, as were the former regulations, or in clear violation of the Free Speech and Assembly provisions of the First and Fourteenth Amendments as well as the Equal Protection Clause of the Fourteenth Amendment." This was the finding of the three-judge court composed of Circuit Judge Coleman and District Judges Russell and Keady, the opinion being written by Chief District Judge William C. Keady. The court patiently set out each of the thirteen new regulations separately and explained why it could not stand. Although this was succinctly done, it required about five thousand words, and space forbids its full reproduction here, desirable as that might be. Only two salient examples can appear:

(1) Barring a person who "advocates" violent overthrow of the government, without differentiating between "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, and preparing a group for violent action by steeling it to such action", is defective. Quoting from a Supreme Court decision: "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, rather than merely to believe in something." 7/

Further, "Not only must there be advocacy to action, there must also be a reasonable apprehension of imminent danger to organized

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7/ Quoting Mr. Justice Harlan in Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed. 2d 1356 (1957).

government." 8/

(2) "Any classification which bans political speeches is arbitrary and unreasonable and was unequivocally condemned by the Supreme Court, holding that political discussion must be free and open." 9/

Evidently skeptical of the ability of the Board of Trustees to produce valid "speaker rules", the court then took the unusual step of drafting a set of rules, and decreeing that they be in force until repealed or amended by the Board. Perhaps the motive was to allay any panicky feeling of being without rules and without confidence to draw up a set that would pass the judicial test.

The court-drafted code comprised about 1,500 words. After declaring that the constitutional freedoms of speech and assembly shall be enjoyed by the students and faculties of the state institutions of higher learning as respects the opportunity to hear off-campus, or outside, speakers on the various campuses, and affirming that free discussion of subjects of either controversial or non-controversial nature shall not be curtailed, it repeats that there is no absolute right to assemble or to make or hear a speech at any time or place, regardless of the circumstances, content of speech, purpose of assembly, or probable consequences of such meeting or speech.

Covering various essential procedural matters incident to the approval and issuing of invitations, and to reviews and appeals

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8/ Citing Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937).

9/ Citing Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L. Ed. 2d 484 (1966).

related thereto,[10] the rules make their main point in a section defining the only conditions under which a request to invite a designated speaker may be refused. "A request made by a recognized organization may be denied only if the head of the institution, or his authorized designee, determines, after proper inquiry, that the proposed speech will constitute a clear and present danger to the institution's orderly operation, by the speaker's advocacy of such actions as: "(wordage abbreviated)

1 Violent overthrow of government.

2 Willful damage or destruction, or seizure and subversion, of the institutional buildings or other property.

3 Forcible disruption or impairment of, or interference with, the institution's regularly scheduled classes or other educational functions.

4 Physical harm, coercion, intimidation, or other invasion of lawful rights, of the institution's officials, faculty members or students.

5 Other campus disorder of a violent nature.

In this fashion the three-judge federal court instructed the board of trustees in the pertinent constitutional law.[11]

10/ To forestall dilatory tactics which might defeat its purpose, the code provides at pertinent points that if a request is not acted upon within a specified brief number of days, it shall be regarded as granted or approved.

11/ Stacy v. Williams, (U.S.D.C., Miss.), 306 F. Supp. 963 (1969).

Only a few months later occasion arose for another application of the foregoing principles. A Young Democratic student organization at the University of Mississippi at Oxford sought to invite Tyrone Gettis, president of the student body at Mississippi Valley State College at Itta Bena (a predominantly black institution) to speak at Oxford on the recent campus disorders at Itta Bena as he saw them. Gettis had been a leader in the student protests at Itta Bena which had led to some violence and a temporary closing of the college; but he was not accused of injuring any persons or property. Chancellor Porter D. Fortune, Jr., of the University of Mississippi, twice refused permission for Gettis to be invited to speak at Oxford, believing that such an event would constitute a clear and present danger to the orderly operation of the University; and a Campus Review Committee voted 4 to 1 to disapprove the request.

United States District Judge Orma R. Smith, after providing a hearing de novo on the matter, concluded with an order: "The decision of the committee will be reversed and University officials will be directed to approve the request." Disavowing any adverse criticism of the chancellor and the committee, the judge merely said they were overly cautious. Gettis had agreed to speak on nothing but the subject assigned. The campus at Oxford had only about 200 black students among a total of 6,000. Three professors at the University (one of English and two of law) had testified that they saw no "clear and present danger" in the proposed speech by Gettis. In these circumstances "The students at the University should not be deprived of the right to hear speakers espousing controversial matters." 12/

12/ Molpus v. Fortune, (U.S.D.C., Miss.), 311 Fed.Supp. 240 (1970).

The Stance of the Federal Courts

The foregoing decisions are by United States district courts (or by specially convened three-judge federal courts) in the Fourth, Fifth, Sixth, and Seventh Circuits. One of them (the Auburn University case) has been affirmed by the United States Court of Appeals for the Fifth Circuit. No case directly involving a "speaker ban" has reached the United States Supreme Court; but the strong trend indicates that statutes and regulations of this type are far along toward the fate recently suffered by the "loyalty oath" statutes in many states-- ultimate extinction-- except in forms that strictly abstain from invasion of the civil rights of students and teachers.

There are some decisions of state courts of the same general tenor as the federal decisions recited here. Fear of ideas, and prohibition of their expression, is not compatible with education, nor permissible under the Constitution of the United States. Formerly the courts generally refrained from taking a hand in the affairs of colleges and schools; now they are willing to intervene to protect civil rights. The change is beneficent.